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NO. 84-748 (2)

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1984

G.W. GREEN,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ of Certiorari
To The Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE RULES OF *ENMUND V. FLORIDA*, 458 U.S. 782 (1982) IS VIOLATED BY THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE.

II. WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JURY'S AFFIRMATIVE RESPONSE TO THE SPECIAL ISSUES PRESENTED PURSUANT TO TEX. CODE CRIM. PROC. ANN. ART. 37.071(b) (VERNON 1979).

III. WHETHER THE TRIAL COURT PROPERLY REJECTED PETITIONER'S CLAIM OF A COERCED CONFESSION BASED ON ITS ASSESSMENT OF THE CONFLICTING TESTIMONY REGARDING COERCION.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals affirming Petitioner's conviction for capital murder is reproduced as Appendix A to the Petition for Writ of Certiorari. The opinion of Judge Clinton, concurring in part and dissenting in part, is also included in Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner bases his claims upon the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Also involved is Tex. Penal Code § 12.31 and Tex. Code Crim. Proc. Ann. arts. 37.071 and 38.03 (Vernon 1979).

STATEMENT OF THE CASE

A. Course of Proceedings and Dispostion Below

Respondent has lawful and valid custody of Petitioner pursuant to a judgment and sentence of the 221st Judicial District Court of Montgomery County, Texas, in Cause No. 12,852-A, entitled *The State of Texas v. G. W. Green.* Petitioner was indicted for capital murder and after a trial before a jury, was found guilty of the offense charged. Thereafter, the jury entered affirmative answers to the questions propounded under Article 37.071(b) of the Texas Code of Criminal Procedure and the court, pursuant to those affirmative findings, entered a death sentence against Petitioner on October 13, 1977. Petitioner thereafter filed an appeal with the Texas Court of Criminal Appeals raising thirty-one grounds upon which he contended his conviction and sentence should be reversed. Petitioner's conviction and sentence were, however, affirmed by the Texas Court of Criminal Appeals in an *en banc* decision delivered July 11, 1984. Petitioner thereafter filed a request for leave to file a motion or rehearing; however, rehearing was denied and Petitioner thereafter filed his present petition for writ of certiorari in this Court.

B. Statement of Facts

On November 19, 1976, at approximately 8:00 p.m., John Denson and his wife, Grace, were in their home watching television downstairs while their daughter, Susan, was in their upstairs bedroom, also watching television. At approximately ten minutes past eight o'clock, someone rang the doorbell and John Denson went to answer it. Mrs. Denson started up the stairs to put on a housecoat but part-way upstairs, heard something and turned to look. She saw someone pushing his

way through the door with a gun in his hand and John Denson trying to keep the door shut (R. 1158-59). Grace Denson then ran upstairs and told her daughter to get down while she pulled a gun from under the mattress. A man then appeared at the door, pointing a gun at Grace and Susan Denson. They were told to lie on the floor and were covered with a blanket. (R. 1161-62). The man then ran downstairs and Grace Denson then heard a shot. Shortly thereafter the same man reappeared upstairs and took Grace and Susan Denson downstairs, still covered by the blanket, where they were left in the family room (R. 1162-64). Grace Denson heard her husband's voice but could not tell what he was saying (R. 1165). While Grace was lying with Susan, covered by the blanket, someone approached and demanded guns, money, or anything else of value (R. 1165). Sometime later, Grace Denson heard two more shots and never heard anything from her husband after that time (R. 1168). Thereafter, both Grace and Susan were tied up (R. 1168). Grace then remembers the voice of the man who originally appeared upstairs telling her, "I killed your old man, you know. You had a good old man, you know." (R. 1169). Grace later heard an automobile approach and it sounded as if it was being pulled into the garage (R. 1170-71). Later Grace heard another man who stood on her feet and said, "Kill them. Kill them. Aren't you going to kill them?" (R. 1172). The same man who suggested killing them would frequently put a gun to the back of her head, and she remembers on at least one such occasion, hearing the hammer of the gun click (R. 1165-66, 1172). Grace Denson later identified Joseph Starvaggi in a lineup as the person who originaly came upstairs and whose face she saw and whose voice she thought was the voice of the person who said "I killed your old man..." (R. 1183).

Susan Denson remembered that she could hear scuffling sounds from downstairs and after Starvaggi threw the blanket over her and her mother, he ran back downstairs and she heard somebody say, "Shoot him, shoot him," after which she heard a shot (R. 1212). After Susan and her mother were taken downstairs and put in the family room, Susan remembered hearing her father talking frequently and the sound of his voice coming from the kitchen (R. 1215). Susan later remembered hearing her father beg "You don't do this," after which two more shots were fired (R. 1217). Susan remembered the man stating

"I killed your old man, you know. I didn't want to do it, but he made me. You had a good old man, you know." (R. 1218) Susan also remembered a car pulling into the garage (R. 1220). Susan remembered that the voice of the man who stated he didn't want to kill her father but was forced to came from the same man who originally appeared upstairs (R. 1222). Susan later was also able to identify the man who originally came upstairs and gave them the instructions as being Joseph Starvaggi (R. 1227).

Grace Denson also remembered that the voice of the person who said "kill them, kill them" had a speech impediment (R. 1423), and that it was not the voice of the person who originally came upstairs and brought she and her daughter downstairs (R. 1424).

On December 8, 1976, Petitioner in his own handwriting executed a statement outlining the events of November 19, 1976. That statement read in part:

> On the nite of 11-19-76 I went to a resident west of Magnolia, Texas in the company of Glenn Martin, Joey Starvaggi and a person known only to me as "Shadow."
>
> We went in cars, Glenn Martin and Joe Starvaggi in Martin's car, and "Shadow" and I in another.
>
> We left Martin's car at some side road and the four of us proceded in one car.
>
> As we passed this house, "Shadow" said this was the one and we turned the car around and we stopped.
>
> It was decided that Joe and myself would approach the house on foot and try the front door.
>
> As I reached the front door and opened it and a man grabbed me and we began to struggle for the pistol. The length of time we fought, I cannot honestly say.

> Joe went upstairs and I called for him to come help as the man had turned the pistol into my stomach and pulled the trigger. The pistol misfired on both times.
>
> I heard shots. The man fell to the floor. I then went to the front door and let Martin in and the car was pulled into the garage by, I believe, "Shadow". I then went into the living room and saw two females tied up. Joey and I went and removed one (1) .30 carbine and two (2) small calibar pistols from a gun case along with a quantity of ammunition.
>
> At this point I would like to state that Joey shot the man two or three times with a pistol that he had took of the lady upstairs.

(R. 1386-87).

The medical examiner testified that John Denson was shot three times and that at least two of those bullet wounds would have resulted in death within a thirty-minute period (R. 1532-33; 1538). Dr. Sheppard testified that he felt that the first wound may have been non-fatal, but really had no basis for determining that (R. 1538-39).

Officer Wesley Styles testified that he noticed both times he talked to Petitioner that he had a slight speech impediment (R. 1396-97).

Albert Pritchett testified that on a number of occasions he had loaned Petitioner a Rossi .38 special revolver, the trigger spring of which he had heated to weaken it so that it was easier to pull the trigger (R. 1401-02). The gun was returned to Pritchett by Petitioner shortly before Pritchett learned of John Denson's death. Under questioning Pritchett stated:

Q. What did he tell you when he returned it to you?

A. He just kind of looked at me and said, "It don't work."

Q. He said "the gun don't work?"

A. Yeah.

Q. Did he tell you anything else about it not working?

A. No, he kind of flipped it open. It don't work. It's a brand new gun. It just don't work. He flipped it open and showed me all five bullets.

Q. He showed you all five bullets?

A. Never once struck again—

Q. Had the shells been printed or crimped on the firing pin area—I mean, the detonator cap area?

A. Yeah.

Q. But they apparently had not fired the bullet from the shell; is that correct?

A. After he left, I took the gun and I went out in my backyard and reload it and pulled the hammer back and pulled the trigger five times, and it still didn't work.

(R. 1403-04).

In testimony presented by Petitioner for the purpose of determining whether or not his confession was admissible, Petitioner testified that he was handcuffed to the bars of his cell, given no food or drink and threatened with death by the officers before he gave his confession (R. 1290-92). Nevertheless, all officers who were present when Petitioner confessed emphatically controverted the story given by Petitioner and testified that they had seen no indication of prior abuse (R. 1271-75; 1329-31; 1340-44).

SUMMARY OF THE ARGUMENT

There are no special or important reasons to reveiw this case. The issues presented involve only the application of well-settled constitutional principles to the facts involved herein.

Enmund v. Florida, 458 U.S. 782 (1982) held that it is a violation of the Eighth Amendment to impose the death penalty upon a defendant who neither killed, attempted to kill, intended to kill, nor contemplated that lethal force would be used. The court below properly found the evidence in the record sufficient to conclude that Petitioner contemplated that lethal force would be used during the crime in which he joined.

It has previously been determined that Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1979) is not *per se* unconstitutional and Petitioner has not presented any evidence that its application to his case is in violation of the United States Constitution. The evidence is fully sufficient to support the imposition of the death sentence upon proof beyond a reasonable doubt in conformance with *In re Winship*, 397 U.S. 358 (1970).

Three witnesses contradicted Petitioner's allegations of a coerced confession, and the trial court was fully justified in believing those witnesses and disbelieving Petitioner. The claim of a coerced confession is a question of fact that has already been resolved against Petitioner and which forms no basis for the grant of a petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reasons in this case, and none exists. Moreover, the Petition for Writ of Certiorari does not raise unsettled questions of law. The issues addressed involve nothing more than the application of well settled constitutional principles to the facts of this case.

II. REVIEW OF PETITIONER'S CLAIM OF A VIOLATION OF *ENMUND V. FLORIDA*, 458 U.S. 782 (1982) SHOULD BE DENIED BECAUSE THE RECORD FULLY REFLECTS

PETITIONER'S WILLING PARTICIPATION IN THE CRIME FOR WHICH HE WAS CONVICTED.

The court below, correctly applying *Enmund v. Florida*, 458 U.S. 782 (1982), carefully considered Petitioner's claim before rejecting it.

In *Enmund*, the petitioner was involved in planning an armed robbery but was down the road in the getaway car when the killing occurred. Green, on the other hand, planned and directly participated in the armed intrusion into the Denson's home.

Enmund involved the armed robbery of an 86 year old man and his 74 year old wife with little reasonable expectation of effective resistance. Green, however, stormed into the home of a police officer in an attempt to obtain guns and valuables.

The jury was entitled to believe that Petitioner and Joseph Starvaggi, knowing that the Densons were at home and that there were firearms in the house, forced their way into the residence and when John Denson, while struggling with Petitioner, began to get the upper hand, Petitioner told Starvaggi to shoot Denson, which he did. The jury could have believed that Petitioner put a gun to the back of Grace Denson's head and demanded information as to the location of valuables, then pulled the trigger of the gun only to have the hammer, which had been tampered with, fail to discharge the bullet awaiting its fall. The evidence that Petitioner contemplated a killing, and specifically John Denson's killing, is significant. Ultimately, however, the questions raised by Petitioner herein are questions of fact as to Petitioner's state of mind and should not form the basis for a petition for writ of certiorari.

III. THE JURY COULD HAVE RATIONALLY ANSWERED QUESTIONS (1) AND (2) UNDER TEX. CODE CRIM. PROC. ANN. ART. 37.071 (b)(VERNON 1979) IN THE AFFIRMATIVE BASED UPON THE EVIDENCE PRESENTED AT TRIAL; HOWEVER, THE COURT SHOULD NOT REVIEW THIS CLAIM AS ONLY FACTUAL ISSUES ARE PRESENTED.

It would certainly have been reasonable, based on the evidence presented at trial, to believe that Petitioner's conduct in calling "shoot him, shoot him" was committed deliberately and with the reasonable expectation that a death would result. The forced entry into an occupied home in which firearms are known to be present, in and of itself, indicates a willingness and indeed an expectation that violence and death might well result.

Further, to argue that the jury could not have found Petitioner to be a continuing threat to society based upon testimony at sentencing that he had a good work record, that a minister felt that he had done good work in the community, and that a handwriting analyst felt that if rehabilitated he could make a positive contribution to society, in effect disregards the function of the jury in believing or disbelieving witnesses. Based upon the evidence presented at the guilt-innocence phase of trial, the jury was indeed entitled to believe that Peitioner would constitute a continuing threat to society and the mere fact that Petitioner presented testimonial evidence to the contrary at sentencing does not preclude the jury from so finding.

The law is well settled that Texas' capital sentencing statute is indeed constitutional, *Jurek v. Texas*, 428 U.S. 262 (1976), and to argue that the jury was not entitled to find as it did is a factual issue which does not, by itself, justify the exercise of this Court's certiorari jurisdiction. *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

Petitioner attempts to argue as a separate issue that the evidence adduced by the prosecution was insufficient to establish his guilt beyond a reasonable doubt. Once again Petitioner merely raises an issue involving the application of well settled law to the facts of his offense. As previously set forth, upon the facts presented, the jury was fully entitled to believe beyond a reasonable doubt that Petitioner was guilty as charged.

IV. THE TRIAL COURT PROPERLY REJECTED PETITIONER'S CLAIM OF A COERCED CONFESSION BASED ON ITS ASSESSMENT OF THE CONFLICTING TESTIMONY REGARDING COERCION.

Three police officers specifically testified in direct contradiction to Petitioner's allegations of coercion at the time he gave his confession. The officers testified that as a matter of department policy they were not allowed to take their guns into an interrogation room, that Petitioner's only requests for food or drink, were that he be served coffee, and that he did not appear tired or under any kind of pressure. All of this testimony controverted Petitioner's claims of being deprived of food and drink and being handcuffed to the bars of his cell, as well as being threatened with guns by the officers prior to his confession. The jury was entitled to believe the three officers testimony and disbelieve Petitioner's. Once again, Petitioner raises a question of fact which has already been determined by a fact-finder and presents no basis for a grant of petition for writ of certiorari.

CONCLUSION

For these reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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Notes